

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FENGHUI FAN, §
§
Plaintiff, §
§
VS. § CIVIL ACTION NO. H-08-3524
§
VICKI BREWER, §
§
Defendant. §

ORDER

This case was dismissed by order of this court on June 17, 2009. (Docket Entry No. 47). The plaintiff, Fenghui Fan, has filed a “Motion to Emergency Request for Relief from Memorandum and Opinion/Order entered on June 17, 2009-6-20,” (Docket Entry No. 51). That motion is denied because Fan has failed to show a basis for relief under Rule 59 of the Federal Rules of Civil Procedure.¹ The arguments that Fan raises in his Brief in Support of Motion for Relief from Judgment, (Docket Entry No.53), were addressed and rejected for the reasons stated in the Memorandum and Opinion, (Docket Entry No. 46). They provide no basis for the relief Fan seeks.

Fan also filed an “Emergency Relief Request for Summary Judgment,” “based on the proposed order of Docket Document 37 and the ‘Brief to Support to Set Aside the Memorandum and Opinion/Order Entered on June 17, 2009,’” (Docket Entry No. 52). That motion is denied for the reasons explained in the Memorandum and Opinion.

¹ Fan’s motion for relief from judgment was filed pursuant to F.R.C.P. 60; however, motions filed within ten days of judgment, as in the instant case, will ordinarily fall under Rule 59(e).

Fan also filed a Motion for Leave to Proceed *In Forma Pauperis* On Appeal, (Docket Entry No. 56). Rule 24 of the Federal Rules of Appellate Procedure provides:

A party who was permitted to proceed in forma pauperis in the district-court action, . . . may proceed on appeal in forma pauperis without further authorization, unless:

A. *the district court*—before or after the notice of appeal is filed—*certifies that the appeal is not taken in good faith* or finds that the party is not otherwise entitled to proceed in forma pauperis and states its reasons for the certification or finding.

FED. R. APP. P. 24(a)(3) (emphasis added). The Committee Notes to this rule make clear that it does not alleviate the authority of the court to prevent a frivolous appeal from being pursued by a *pro se* litigant:

The [Rule] permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, *while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith*, 28 U.S.C. § 1915(a)

FED. R. APP. P. 24 Committee Notes (emphasis added).

“Under 28 U.S.C. § 1915(a), a federal court may refuse to certify an appeal for *in forma pauperis* status if it is not taken in good faith.” *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). The court’s inquiry into whether the appeal is taken in good faith “is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).” *Id.* at 220 (quotation marks omitted). A movant must demonstrate the existence of a non-frivolous issue for appeal. *See Payne v. Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988). If the district court can discern the existence of any nonfrivolous issue on appeal, the movant’s petition to appeal *in forma pauperis* must be granted. *Howard*, 707 F.2d at 220 (citation omitted). The district court should consider any pleadings and motions of a *pro se* litigant

under less stringent standards than those applicable to licensed attorneys. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The record does not disclose any nonfrivolous issue on appeal. The motion for leave to appeal *in forma pauperis* is denied.

Fan also filed a Motion for Expedite Appeal, (Docket Entry No. 55), seeking immediate appellate relief. The Motion to Expedite Appeal is denied as moot, without prejudice to its reassertion before the United States Court of Appeals for the Fifth Circuit .

SIGNED on July 2, 2009, at Houston, Texas.



Lee H. Rosenthal
United States District Judge